Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROGER HENDERSON,

PETITIONER

VS.

RAY KESSLER; EDWARD W. MURRAY;
DAVID A. WILLIAMS; and TIEN D. NGUYEN;

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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100 pp

QUESTIONS PRESENTED

1. Whether the correct standard for summary judgment was applied?

2. Whether res judicata and/or collateral estoppel apply to bar Petitioners claims against Respondents Murray, Kessler and Williams?

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Petitioner, Roger Henderson, respectfully prays that a writ of certiorari is granted to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit

affirming the United States District Court for the Eastern District of Virginia, Richmond Division, in its entry of summary judgment in favor of (a) Dr. Tien N. Nguyen on the basis that the petitioner failed to provide evidentiary support for his allegations of deliberate indifference, and (b) Ray Kessler, Edward W. Murray and David A. Williams on the basis of res judicata and collateral estoppel.

OPINIONS BELOW

The unpublished opinion of the Fourth Circuit Court of Appeals appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Eastern District of Virginia appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Opinion in

this matter was decided and entered on June 20, 1994. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII and Amendment XIV to the United States Constitution are set forth in Appendix C and E, respectively. Title 42, U.S.C. § 1983 is set forth in Appendix D. Rule 56(c) of the Federal Rules of Civil Procedure set forth in Appendix J.

STATEMENT OF THE CASE

The United States District Court, Eastern District of Virginia, Richmond Division, had jurisdiction over this matter pursuant to Title 42, §1983 and the 8th and 14th Amendments to the United

States Constitution.

This is not a "mere" prisoners rights lawsuit. This is a case involving the substantive rights of a person injured while in the custody of the Virginia criminal penal system.

Petitioner Roger Henderson walked into the Virginia Correctional System; when discharged from Powhatan Correctional Center, Roger Henderson rolled out in a wheelchair, to which he is confined for the remainder of his natural life.

Only the Supreme Court, as the Court of last resort, can, and Roger Henderson prays, will, allow him to finally have his day in court so that he might sit before a jury of his peers to decide whether or not the prison officials and/or medical provider were deliberately indifferent to his medical needs, and if

so, to award him money damages for the injuries sustained.

Roger Henderson believes the Respondents failed and refused to properly respond to his numerous grievances and requests for medical care but for which he would be today pursuing a fruitful life instead of being in the pitiful condition to which he is now bound.

On August 17, 1988, Petitioner Roger Henderson was being transported by officers of the Richmond City Sheriff's Department to Henrico County Jail in the Commonwealth of Virginia via prison van. While en route to Henrico County Jail, the driver of the van slammed on the brakes to avoid an accident. As a result of this sudden application of the brakes, Mr. Henderson, who was handcuffed and shackled at the time, was violently

thrown against the steel interior bulkhead of the van. Mr. Henderson's head and back struck the bulkhead with extreme force. Another prisoner, who was chained to Mr. Henderson, was unavoidably thrown on top of Mr. Henderson, pinning Mr. Henderson against the bulkhead.

While incarcerated at Henrico County Jail for five (5) months, Mr. Henderson was housed in isolation at Henrico County Jail, and experienced worsening pain in his lower extremities, followed by loss of sensation. As a result of Mr. Henderson's deteriorating medical condition, he made numerous requests for medical care and treatment. Mr. Henderson was denied access to medical care and appropriate treatment for his worsening neurological condition caused by the accident, and while housed at Henrico County Jail he filed numerous

complaints as a result of being denied access to appropriate medical care and treatment. Said complaints described symptoms indicative of increasing neurological problems. As described in Mr. Henderson's Inmate Grievances filed on September 7, 1988, January 11, 1989 and January 29, 1989, Mr. Henderson suffered increased back pain, severe headaches and progressively decreased sensation in both legs. On October 17, 1988, Donald Boswell, Sheriff of Henrico County, stated that the jail physician, Dr. Furman, who was not a neurologist, "examined Henderson relevant to this complaint and does not believe a specialist opinion is necessary."

On October 28, 1988, Mr. Henderson, as a result of his worsening neurological condition, collapsed and was hospitalized at the Medical College of Virginia in

Richmond, Virginia for eleven (11) days. By this time, Mr. Henderson's mobility was so impaired that he could no longer ambulate without the assistance of a walker or wheelchair.

On November 8, 1988, Mr. Henderson was returned to Henrico County Jail. Mr. Henderson was assigned to Pro-Class Isolation, ostensibly for "observation," where he remained for several weeks.

The Prison Health Services Staff at Henrico County Jail were not responsive to Mr. Henderson's numerous requests for appropriate medical care, treatment or for a wheelchair.

On March 7, 1989, Mr. Henderson was transported to Powhatan Correctional Center. At Powhatan Correctional Center, Mr. Henderson, was placed into isolation and denied medical attention, shower facilities, religious services,

recreation and other basic privileges. As a result of being denied medical care, on March 28, 1989, Mr. Henderson filed an Inmate Grievance on an emergency basis. Such grievance described Mr. Henderson's progressing neurological deterioration, including severe pain, severe headaches and significant decreased sensation on the left side of his body (face, arm and hand). Mr. Henderson requested immediate neurological testing. On March 29, 1989, Mr. Henderson's grievance was denied emergency status, allegedly because Mr. Henderson (1) was not subject to substantial risk of personal injury and (2) was not seriously or irreparably harmed.

On March 31, 1989, Mr. Henderson filed an Inmate Grievance complaining of unwarranted detention in Powhatan's Mental Ward in a cell unfit for

habitation because it was covered with human feces and reeked of urine, and that he was still denied the use of a wheelchair.

On April 30, 1989, Mr. Henderson appealed to the regional Ombudsman, citing the August 17, 1988 accident, the subsequent maltreatment by correctional authorities and his isolation at Henrico county Jail and Powhatan Correctional center due to the fact that neither facility was equipped to house a paraplegic inmate, and that he was in need of medical care.

On May 19, 1989, Mr. Henderson filed an Inmate Grievance where he again described symptoms indicative of progressing neurological deficits, including "severe lower back pain," cold legs, severe headaches and insomnia. Mr. Henderson once again requested a

neurological examination.

On June 5, 1989, Mr. Henderson, dissatisfied with the Institutional response to his grievance, filed an appeal.

On June 28, 1989, Mr. Henderson filed a second appeal, once again demanding to see a neurologist.

On July 7, 1989, Mr. Henderson was finally examined by a neurologist, nine months after the October 12, 1988 denial for a neurological examination, referenced above.

The neurologist who examined Mr. Henderson on July 7, 1989 recommended that Mr. Henderson receive further evaluation and testing, specifically an MRI test, which was not performed for thirty (30) days, despite said neurologists repeated requests for said test.

On July 12, 1989, Mr. Henderson, in yet another attempt to receive proper medical attention, filed another Inmate Grievance complaining of a loss of feeling in his left arm, severe headaches, dizziness and swollen ankles.

On August 3, 1989, Mr. Henderson appealed the Institutional Level I response. Mr. Henderson noted that, due to a lack of feeling, his left arm had collapsed causing him to fall and strike his head while attempting to use prison toilet facilities that were not equipped to accommodate paraplegics.

That prison and medical staff at Powhatan Correctional Center did not provide adequate treatment to Mr. Henderson for injuries sustained as a result of the fall set forth hereinabove.

On August 17, 1989, Mr. Henderson filed an Inmate Grievance wherein he

alleged that the lack of proper facilities for the handicapped at Powhatan Correctional Center caused the injuries sustained in the fall discussed herein.

On May 9, 1990, Mr. Henderson filed an Inmate Grievance wherein he demonstrated that, after a nine (9) day stay at Medical College of Virginia, physicians determined that, by that time, it would be futile to perform an operation to restore the use of his legs because his condition had deteriorated to an inoperable state. Additionally, the attendant risk associated with the operation had increased while the probability of success had correspondingly decreased.

On June 22, 1990, Bruce Coplin, M.D., of the Medical College of Virginia, certified that Mr. Henderson suffered a

permanent disability in that he is unable to ambulate and is wheelchair bound. The deposition of Dr. Coplin (See Coplin depo. p.43-45 attached hereto as Appendix F p. 35-38) was taken in the then pending action prior to trial on December 1, 1992 at which time Dr. Coplin confirmed under oath that when he examined Roger Henderson on June 5, 1990 his medical condition was that of a paraplegia, with a paralyzed bladder; he was a patient who was wheelchair bound, unable to ambulate and that the paralysis appeared to be permanent at that time, finally indicating that Roger Henderson was going to be in a wheelchair for the rest of his life and would not be able to walk again.

Today, Mr. Henderson is a disabled, wheelchair-bound paraplegic, a condition that, but for the accident of August 17, 1988 and resultant failure of the

defendants to render proper care and treatment, would not have happened. Mr. Henderson, simply put, did not receive the immediate, proper, necessary and continued attention that the Commonwealth of Virginia and its officers and agents were duty bound to provide. They were indeed, deliberately indifferent to his most serious medical needs, thereby depriving him of the ability to ever walk again.

Respondent Williams was the Warden/Facility Director at Powhatan Correctional Center, and in that capacity was responsible for the operation of Powhatan Correctional Center. During the time of the Petitioner's incarceration, Respondent Williams did not have in effect a policy, custom, practice or regulation which provided adequate training to all officers and

agents of the Powhatan Correctional Center in the proper monitoring and handling of the medical needs of inmates incarcerated within the jurisdiction of the Commonwealth of Virginia. The failure of Respondent Williams not to have in effect a policy, custom, practice or regulation evidence a conscious and deliberate indifference to the medical needs of, and to provide adequate medical care to and for inmates at Powhatan, especially to the Petitioner. Respondent Williams breached his duty of care to the Petitioner by failing to have proper policies and practices which would ensure the provision of adequate medical care to this Petitioner and inmates at Powhatan.

At all times relevant to the within action Respondents Kessler and Murpay were the Deputy Director and/or Director of the Virginia Department of

Corrections, and in that capacity were responsible for the operation of the Virginia Department of Corrections.

During the time of the Petitioner's incarceration, Respondents Kessler and Murray did not have in effect a policy, custom, practice or regulation which provided adequate training to all officers and agents of the Powhatan Correctional center in the proper monitoring and handling of the medical needs of inmates incarcerated within the jurisdiction of the Commonwealth of Virginia. The failure of Respondents Kessler and Murray not to have in effect a policy, custom, practice or regulation evidence a conscious and deliberate indifference to the medical needs of, and to provide adequate medical care to and for inmates at Powhatan, especially to the Petitioner. Respondents Kessler and

Murray breached their duty of care to the Petitioner by failing to have proper policies and practices which would ensure the provision of adequate medical care to this Petitioner and inmates at Powhatan.

At all times relevant to the within action Respondent Nguyen was the Attending Physician at Powhatan Correctional Center, and in that capacity was responsible for the operation of the medical treatment facilities at Powhatan Correctional Center. Respondent Nguyen breached his duty of care owed to the Petitioner, and was deliberately indifferent to the medical needs of Roger Henderson by failing to provide, treat and diagnose his medical condition, and failing and/or refusing to secure for Roger Henderson the medical treatment so clearly required.

Respondent Nguyen was acting

pursuant to the policies and practices condoned and mandated by Appellees Williams, Murray and Kessler.

Petitioner filed a Pro Se action in the United States District Court for the Eastern District of Virginia, Alexandria Division. Subsequently, his employed counsel, filed the instant action, also, in the United States District Court for the Eastern District of Virginia, but in the Richmond Division. Petitioner's counsel filed a motion to consolidate said actions below. The motion was overruled. Roger Henderson, as a Pro Se litigant, proceeded to hearings before the United States Magistrate Judge in his original action. Thereafter, Petitioner's counsel proceeded with discovery and extensive trial preparation in the instant action below. The case was scheduled for trial by jury in

December 1992 on Petitioner's Second Amended Complaint, the court having held a hearing on November 9, 1992 on Respondents Motions to Dismiss, and having overruled same as to the remaining causes of action. Following such action by the Court, Respondents then immediately sought summary judgment on the remaining causes of action, and were granted such judgment by court order dated 8 December 1992, days prior to the commencement of trial in the instant action. The Petitioner filed a Motion for Reconsideration which was treated as a Motion to Amend or Alter Judgment and denied by court order dated February 1, 1993. Petitioner filed a timely Notice of Appeal in the United States Court of Appeals for the Fourth Circuit.

On February 9, 1994 argument was heard before the Fourth Circuit and on

June 20, 1994 the Fourth Circuit rendered its opinion affirming the District Court's order granting the Respondents motions for summary judgment.

The blatant facts of this case delineate a horrible injustice done to Roger Henderson. They speak for themselves. It is unthinkable to the Petitioner that the District Court, and the Fourth Circuit Court of Appeals, have denied this Petitioner's right to trial and his day in court, by the granting of summary judgment over the strong objections and filings, Affidavits, pleadings and depositions of record below.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two (2) reasons: (1) the District Court and the Court of Appeals applied the wrong standard for summary judgment; and (2) The Fourth Circuit rendered their opinion in conflict with other circuits regarding the concept of res judicata and collateral estoppel.

I. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH THE CORRECT STANDARD FOR SUMMARY JUDGMENT

This Court has clearly held that upon a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, the burden is on the moving party to show conclusively that there exists no genuine issue as to material fact, considering the evidence most favorably to the party against whom the motion is directed. United States v.

Deibold, Inc., 369 U.S. 654, 655 (1962).[1]

According to Fed. R. Civ. P. 56(c), summary judgment is proper only,

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Id.

In Celotex Corp. v. Catrett, Adm'x of the Estate of Catrett, 477 U.S. 317, 322 (1986), the Supreme Court delineated how a party moving for summary judgment must demonstrate to the court that no such issue of material fact exists:

> A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings,

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[1] The Fourth Circuit has adopted the holding that the record and evidence should be considered in the light most favorable to the non-movant. Smith v. Hill, 632 F.2d 316, at 338; Leakas v. Columbia Country Club, 831 F.Supp. 1231, at 1235.

> depositions, answers to interrogatories, and admissions on file together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323.

The Opinion of the Fourth Circuit below conflicts with this Court's holding in Celotex and following cases. Here the Fourth Circuit held that,

> Doctor Nguyen's actions simply do not approach the level of deliberate indifference proscribed by the Eighth Amendment. If mistakes were indeed made, they were mistakes of medical judgment impervious to judicial review in a §1983 action.

By deciding that the Respondents did not act with deliberate indifference[2], the

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[2] The standard of deliberate indifference applied by the Fourth Circuit in this matter conflicts with a previous decision of this Court. On 6 June 1994, this Court decided the matter of Dee Farmer v. Edward Brennan, Warden, 114 S.Ct. 1970 (1994), setting forth a new standard to apply to Eighth Amendment deliberate indifference cases. The Court adopted the "subjective

lower courts decided a question of fact, and accordingly, clearly invaded the province of the jury.[3]

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recklessness" standard to define deliberate indifference and held that "[a]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. Id. at 1980. On 20 June 1994, fourteen (14) days after this Court rendered its opinion in Dee Farmer as to the applicable standard one should apply in deliberate indifference cases, the Court of Appeals for the Fourth Circuit affirmed the decision of the District Court without any reference to Dee Farmer. Accordingly, for failing to apply the correct standard of deliberate indifference, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

[3] The question of whether or not the prison officials and doctors who treated Petitioner Henderson acted with deliberate indifference was a question of fact for a jury to decide and therefore precluded a finding of summary judgment. See Greason, et al. v. Kemp, 891 F.2d 829, 835 (11th Cir. 1990); Marsh v. Arn, 937 F. 2d 1056 (6th Cir. 1991) reh'g denied (6th Cir. 1991); Hicks v. Frey, 992 F. 2d 1450, 1453 (6th. Cir. 1993) reh'g denied (6th Cir. 1993); Cortes-Quinones v. Jimenez-Nettleship, 842 F. 2d 556, 562 (1st Cir. 1987); Reynolds v. Borough of Avalon, 799 F.Supp. 442, 446 (D. N.J. 1992); See Also Redman v. City of San Diego, 896 F.2d

Based upon the evidence and record presented to the District Court and the Fourth Circuit there was more than sufficient evidence on both sides to create a clear genuine issue of material fact as to whether or not the Respondents acted with deliberate indifference toward Petitioner's health and well being.

The record is replete with evidence in support of Petitioner's claims of deliberate indifference. The record consists of the following, but not limited, evidence:

1. That Petitioner Henderson made approximately nine (9) grievances concerning the medical treatment which he received and/or failed to receive, and outlining his medical condition, need for treatment, and his demand for treatment.

362, 370 (9th Cir. 1990)(Tang J., concurring).

2. Rex Smith, Petitioner's expert, opined that the "defendants failure was a result of their individual and collective deliberate indifference toward the establishment, promulgation and implementation of the appropriate and necessary policies and procedures." See Smith Affidavit attached hereto as Appendix G p.39-42 and incorporated herein by reference. Said Affidavit was also of record before the Court of Appeals for the Fourth Circuit in the Joint Appendix.

3. In Roger R. Henderson v. D.T. Mahon, Judge Brinkema concluded in her Report and Recommendation that "the VDOC may have erred in sending Plaintiff [petitioner] to a facility not adapted to his special physical needs..." (Report, October 15, 1992, at 8).

4. During Petitioners incarceration

at the Powhatan Correctional Center, Petitioner described the "physical therapy" he received as consisting only of a TENS Unit being placed on his body. See Petitioner's deposition p.62 attached hereto as Appendix I p. 46-48 and incorporated herein by reference.

5. That Petitioner repeatedly complained of low back pain and neurological deficits and yet Dr. Nguyen finding a history of paraplegia, and diagnosing low back strain and paraplegia, a neurological condition, prescribes only Motrin two times a day and issues an order for an egg-crate mattresses were the appropriate treatment. See Dr. Nguyen deposition p. 27 attached hereto as Appendix H p. 43-45 and incorporated herein by reference.

6. Dr. Nguyen asserted that additional medical diagnostic tests were

not necessary or required to treat Petitioner.

There is a point, as evidenced by this case, where the incompetence and professional inadequacy of a doctor rises to the level of deliberate indifference, and it is the responsibility of the trier of fact, after introduction of all the evidence to make that determination. For the court to grant summary judgment under these factual circumstances is unthinkable. Based upon the foregoing and the record that was before the District Court and the Fourth Circuit, there is little question that if the trier of fact was allowed to do its job that reasonable minds could differ as to whether the Respondents' treatment of the Petitioner constituted deliberate indifference.

Accordingly, the Fourth Circuit's

opinion conflicts with the clear holding of this Court under Rule 56 and Celotex.

This Court should take this opportunity to clarify its holding in Celotex relied upon by the Fourth Circuit below. Celotex in no way purports to take genuine issues out of the province of the jury and allow courts to decide clear issues of fact and substance, such as deliberate indifference.

This Court should further grant certiorari here to amplify the standard of summary judgment and explicitly rule that "even though a trial court may not believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a

real issue exists."[4]

The purpose of summary judgment is not to take genuine issues from the jury but rather to decide that as a matter of law there is no issue to be decided by the jury.

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[4] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W. 2d 476 (1991),the Kentucky Supreme Court held that a summary judgment motion must be 'viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.' Id. at 480. As a result thereof, summary judgments are to be cautiously applied and should not be used as a substitute for trial. Id. at 483.

A trial court must not grant a summary judgment motion even if the trial court believes the opposing party will not succeed at trial, if there is an issue of material fact. Id. at 480. If the opposing party puts any material fact into issue, no matter how questionable, the summary judgment motion must be denied.

Finally, the Steelvest Court held that when the trial judge examines the evidence, he or she must not decide any issue of fact, but discover merely if a real issue exists. Id. at 480. As the Court held, "[i]t clearly is not the purpose of the summary judgement rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try." Id. at 480.

II. THE FOURTH CIRCUIT COURT RENDERED THEIR OPINION IN CONFLICT WITH OTHER CIRCUITS REGARDING THE CONCEPT OF RES JUDICATA AND COLLATERAL ESTOPPEL.

The District Court applied the doctrine of res judicata to Petitioner's action against Respondents Williams, Kessler and Murray. The Circuit Court affirmed. However, the Fourth Circuit below neither examined the principles and policies underlying the doctrine nor examined the circumstances of the instant case to determine if an exception to the doctrine might be warranted. In so doing the Fourth Circuit creates a conflict among the circuits with regards to considering important issue of public and private interest.

The claim preclusion doctrine bars a second suit based on the same cause of action or claim and the issue preclusion

doctrine bars "relitigation of issues actually litigated and necessary to the outcome of the first action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) (emphasis added). See also Carr v. District of Columbia, 646 F.2d 599 (U.S. App. D.C. 1980); American Medical International Inc. v. Secretary of Health, Education and Welfare, 677 F.2d 120 (U.S. App. D.C. 1988).

The doctrine of res judicata encompasses four preclusive effects, namely: (1) merger, (2) direct estoppel, (3) bar, and (4) collateral estoppel, the latter two being commonly referred to as claim preclusion and issue preclusion, respectively. Bates v. Devers, 202 S.E.2d 917, 920 (Va. 1974).

Res judicata-bar precludes relitigation of the same cause of action that was or could have been litigated

between the same parties or their privies. Id., at 920-21. Thus, the designation "claim preclusion".

Likewise, collateral estoppel prevents the relitigation of any issue of fact actually litigated in the original litigation and essential to the valid judgment. Thus, the designation "issue preclusion". Id., at 921. Collateral estoppel precludes relitigation of legal issues as well as factual ones, but this prohibition is enforced with considerable more leniency than that of factual issue preclusion. Id.

The doctrine of res judicata is judicially crafted and founded upon important considerations of public policy favoring certainty in legal relations, a defined end to litigation, and the prevention of harassment of litigants. Id. at 920. See also Commissioner of

Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948), Pickeral v. Federal Land Bank of Baltimore, 177 Va. 743, 750 (1941).

The doctrine of res judicata is firmly rooted in American law and the overwhelming propensity of state and federal courts is to apply the doctrine without inquiry into equity of doing so. Ward v. Charlton, 177 Va. 101, 115 (1941) ("The doctrine is firmly established in our jurisprudence and should be maintained where applicable".) Indeed, a rule is a rule and departure therefrom should be exceptional, not customary.

However, a number of courts, both state and federal have acknowledged that blind compliance is not always appropriate, especially where important issues of public and private interests are involved. Bates v. Devers, 214 Va. 667, 669 (1974) (res judicata may give

way when in conflict with other, more important public policies), Griffin v. Board of Education, 296 F. Supp. 1178, 1182 (E.D. Va. 1969) (where private litigation has extensive implications of public import, the rules of res judicata or estoppel are not allowed to stultify reassessment of prior decisions.)

In Spilker v. Hankin, 188 F.2d 35 (1951) the U.S. Circuit Court for D.C. held that the Court should weigh different rules and polices against competing necessities and that situations may arise which could call for exceptions to the general rule regarding res judicata. Id. at 38. "Res judicata, as the embodiment of public policy, must, at all times, be weighed against competing interests, and on occasion, yield to other policies." Id. at 38-39.

Likewise in Societe Anonyme des

Parfums le Galion v. Jean Patou, Inc., 495 F.2d 1265 (1974) the 2nd Circuit held that "res judicata principles, if applied inflexibly, can at times result in unwarranted hardship.ß Id. at 1276. The Court in that case found that the doctrine of res judicata "is intended to serve the aims of fairness and efficient judicial administration, it need not be applied mechanically where those ends would not be served." Id. at 1276.

Additionally, in Moch v. East Baton Rogue Sch. Distr., 543 F.2d 594 (1977) the Fifth Circuit found that, "Courts have occasionally rejected strict application of bar and estoppel principles when their use would violate an overriding public policy or result in manifest injustice." Id. at 596. See also International Harvester v. OSHA, 628 F.2d 982 (1980) (Seventh Circuit finding

that where the technical requirements of res judicata have been established, a court may nonetheless refuse to apply the doctrine; Res judicata must yield on occasion to competing public policies.)

In the case at bar the Fourth Circuit failed to consider any public policy issues which would have created an exception to the strict application of res judicata and collateral estoppel. Specifically, the first case dealt with a pro se defendant who was not provided the assistance of counsel. Once counsel was provided to said Petitioner it was immediately identified that other parties were negligent that different causes of action applied, and that separate litigation should ensue. The court below denied consolidation.

Additionally, granting Defendant's Motion for Summary Judgment was

inappropriate because Petitioner did not have a full and fair opportunity to litigate his claims. In Defendants' Supplemental Motion for Summary Judgment, Respondents argued that the issues raised by the Petitioner were previously litigated in Henderson v. Williams, et al., C.A. No. 89-1723-AM (E.D. Va. June 13, 1991). The principle of collateral estoppel bars relitigation of a particular issue or determinative fact. Allen v. McCurry, 449 U.S. 90 (1980). Collateral estoppel does not bar the Petitioner's cause of action, however, in that the Petitioner has not had a full and fair opportunity to litigate his claim. When Mr. Henderson proceeded in his pro se action, there can be no question that the issue of whether the Respondents in this action failed through deliberate indifference to establish

proper policies and procedures **was not fully and fairly litigated and was not actually decided.** See Allen v. McCurry, 449 U.S. 90, 94 (1980) ("one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in an earlier case"); see also, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

Restatement 2nd, Judgments, §27 states that for an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It must also have been actually decided, and this decision must have been necessary to the outcome. For relitigation of an issue to be

collaterally estopped, therefore, that issue must be both identical to an issue litigated in the earlier suit and a necessary precursor to that decision. Fleischer v. Detroit Cadillac Motor Co., 165 N.Y.S. 245 (1st Dept. 1917); Berlitz Schools of Languages of America v. Everest House, 619 F.2d 211 (2d Cir. 1980).

The Court in Henderson v. Williams, et al., C.A. No. 89-1723-AM (E.D. Va. June 13, 1991), neither decided nor considered the issue of whether Appellees Murray, Kessler and Williams failed through deliberate indifference to establish proper policies and procedures governing proper medical attention to Mr. Henderson, or whether Respondent Nguyen failed through deliberate indifference to properly treat Mr. Henderson. These particular issues are not identical to

any other raised in the Petitioner's earlier suit, they were not necessary to the outcome of the original suit and they were not fully and fairly litigated.

Aside from the fact that it was legally impossible for the Petitioner to raise the issue in question against the Respondents in the previous action, the notion that if a party could have raised a claim or cause of action in an earlier action, then that party is subsequently barred from raising the new claim in a later action, is not a rule that is either certain or established. The Court in Allen v. McCurry, 449 U.S. 90 (1980), did not establish a bright-line rule for application of the collateral estoppel and res judicata bars. For instance, where a §1983 Plaintiff seeks to litigate in federal court a federal issue which he could have raised but did not raise in an

earlier state-court suit against the same adverse party, collateral estoppel does not apply. Lombard v. Board of Ed. of New York City, 502 F.2d 631 (CA2 1974); Graves v. Oligiata, 550 F.2d 1327 (CA2 1977); Mack v. Florida Bd. of Dentistry, 430 F.2d 862 (CA5 1970). Although this action was not previously brought in state court, these cases indicate that courts are hesitant to assume that a particular issue should have been raised in an earlier proceeding -- the more important and equitable question is whether that issue was fully and fairly litigated. Here, it is clear that it was not.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: 30 September 1994

Respectfully submitted,

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By: RICHARD D. HEIDEMAN

Attorneys for Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROGER HENDERSON, Plaintiff-Appellant, v. RAY KESSLER; EDWARD W. MURRAY; DAVID A. WILLIAMS TIEN D. NGUYEN, M.D., Defendants-Appellees and VIRGINIA DEPARTMENT OF CORRECTION; POWHATAN CORRECTIONAL CENTER; COMMONWEALTH OF VIRGINIA; MEDICAL COLLEGE OF VIRGINIA; SHERIFF'S DEPARTMENT, COUNTY OF HENRICO; SHERIFF'S DEPARTMENT OF THE CITY OF RICHMOND; DONALD L. BOSWELL; ANDREW WINSTON; STANLEY FURMAN, M.D.; JOHN DOE; JANE DOE, Defendants.	No. 93-6222

APPENDIX A

ROGER HENDERSON,
Plaintiff-Appellant,

v.

RAY KESSLER; EDWARD W. MURRAY; DAVID A. WILLIAMS TIEN D. NGUYEN, M.D.,
Defendants-Appellees

and

VIRGINIA DEPARTMENT OF CORRECTION; POWHATAN CORRECTIONAL CENTER; COMMONWEALTH OF VIRGINIA; MEDICAL COLLEGE OF VIRGINIA; SHERIFF'S DEPARTMENT, COUNTY OF HENRICO; SHERIFF'S DEPARTMENT OF THE CITY OF RICHMOND;DONALD L. BOSWELL; ANDREW WINSTON; STANLEY FURMAN, M.D.; JOHN DOE; JANE DOE,
Defendants.

No. 93-6222

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.

Robert R. Merhige, Jr., Senior District Judge. (CA-91-346-R)

Argued: February 9, 1994

Decided: June 20, 1994

Before HAMILTON and WILLIAMS, Circuit Judges, and OSTEEN, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard D. Heideman. THE HEIDEMAN LAW GROUP, P.C., Chevy Chase, Maryland, for the Appellant. Pamela Anne Sargent, Assistant Attorney General OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia for the Appellees Kessler, Murray, and Williams; Sandra Morris Holleran, MCQUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia for Appellee Nguyen.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

In August 1988, Appellant Roger Henderson was transported in a prison van by officers of the City of Richmond Sheriff's Department to Henrico County Jail in Virginia. While en route, the driver of the van slammed on the brakes to avoid an accident. Henderson, who was handcuffed and shackled, was thrown against the interior of the van and another prisoner was thrown on top of him, thereby pinning Henderson against the inside of the vehicle.

While in the Henrico County Jail, Henderson experienced increasing pain in his lower extremities, followed by a loss of sensation. On March 7, 1989, he was transferred to Powhatan Reception and Classification Center (PRCC) for six weeks of evaluation and classification,

and then to Powhatan Correctional Center (PCC) until his May 24, 1990, parole release. Henderson claims his physical and neurological conditions continued to decline at PRCC and PCC. Henderson attributes his deteriorating conditions to the denial of access to medical care and appropriate treatment for the injuries sustained in the van incident[1] and the lack of proper facilities for the handicapped.

The record shows, however, that Henderson was seen repeatedly by prison doctors and specialists at the Medical College of Virginia (MCV). After filing numerous inmate grievances concerning the

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[1] None of the medical evaluations indicated an organic cause for his paralysis. Instead, he was diagnosed as having hysterical conversional paraplegia but was treated functionally as a paraplegic. (Report of Nathan D. Zusler, M.D., Director, Brain Injury Rehabilitation Services, Med. Col. of Va. dated 10/26/89).

purported inadequacies of the medical care, Henderson brought this action under 42 U.S.C. § 1983 (1988), against Director of the Virginia Department of Corrections Edward W. Murray, Deputy Director of the Virginia Department of Corrections Ray Kessler, PCC Warden David A. Williams, and PCC physician Dr. Tien D. Nguyen. Henderson claims that his permanent injuries were proximately caused, in direct violation of the Eighth Amendment, by the deliberate indifference of Murray, Kessler, and Williams in failing to establish proper policies and procedures governing appropriate medical care and of Dr. Nguyen in failing to render proper treatment.[2]

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[2] Henderson's Amended Complaint and Second Amended Complaint included allegations of due process violations, gross negligence, negligence, failure to diagnose, failure to treat, medical malpractice, negligent infliction of emotional distress, and loss of power to

The district court granted summary judgment to Dr. Nguyen on the basis that his affidavit and deposition showed adequate efforts to meet Henderson's medical needs, and that Henderson failed to provide evidentiary support for his allegations of deliberate indifference. The court also granted summary judgment to the non-medical defendants, finding that a previous case brought by Henderson rendered his present action subject to the bars of res judicata and collateral estoppel. In addition, the court denied Henderson's Fed. R. Civ. P. 59(e) Motion for Reconsideration.

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earn money. Other Defendants originally named in this action were eventually eliminated through a combination of voluntary dismissals and dispositive motions. The instant appeals focus solely on Henderson's Eighth Amendment claims.

I.

We turn first to a de novo review of the district court's order granting Appellees' summary judgment motions. Miller v. Federal Deposit Ins. Corp., 906 F.2d 972, 974 (4th Cir. 1990).

To establish his § 1983 claim against Dr. Nguyen, Henderson must show that Dr. Nguyen was deliberately indifferent to his serious medical needs. Wilson v. Seiter, 501 U.S. 294,___,111 S. Ct. 2321, 2323 (1991). For deliberate indifference to rise to the level of an actionable violation of the Eighth Amendment prohibition against cruel and unusual punishment, "the treatment must be so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Miltier v. Beorn, 896 F.2d

848, 851 (4th Cir. 1990). Hence, mere negligence or malpractice in diagnosis or treatment is not enough. Estelle v. Gamble, 429 U.S. 97, 106, (1976). "To be cruel and unusual punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." Wilson, 501 U.S. at ___, 111 S. Ct. at 2324 (quoting Whitley v. Albers, 475 U.S. 312, 319 1986).

The record in this case shows that Dr. Nguyen, one of several attending physicians, saw Henderson frequently and referred him to specialists when necessary. The record is replete with voluminous documentation of almost constant medical care and supervision provided to Henderson, including frequent referrals to MCV on both in-patient and out-patient bases. Henderson's failure to provide any supported allegation of

deliberate indifference or other admissible evidence showing the existence of a genuine issue for trial cannot rebut Dr. Nguyen's summary judgment motion and supporting affidavit and deposition. Celotex Corp v. Catrett, 477 U.D. 317, 324 (1986); see also Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) ("[W]holly speculative assertions will not suffice."). Doctor Nguyen's actions simply do not approach the level of deliberate indifference proscribed by the Eighth Amendment. If mistakes were indeed made, they were mistakes of medical judgment impervious to judicial review in a § 1983 action. Russell v. Sheffer, 528 F.2d 318, 319 (4th Cir. 1975).[3]

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[3] Given our affirmance of the district court's conclusion that Henderson's claims against Dr. Nguyen

II.

Henderson previously asserted his claims of deliberate indifference and inadequate facilities for the handicapped at PCC in a § 1983 action against PCC Warden Williams and PCC medical personnel other than Dr. Nguyen. Henderson v. Williams, No. 89-1723-AM (E.D. Va. June 13, 1991) (Henderson I). The Henderson I court granted Defendants' motion for summary judgment, finding that facilities at PCC were adequate to serve the specialized needs of the handicapped, and that Defendant physicians were not deliberately indifferent to Henderson's medical needs.[4] The issue of inadequate

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did not state a genuine issue for trial, we find it unnecessary to consider Dr. Nguyen's cross-appeal of the denial of his Motion to Dismiss the claims against him as barred by the statute of limitations.

[4] One claim reserved for ruling in *Henderson I*, concerning a loose handrail in a toilet, was dismissed

policies and procedures governing appropriate medical care was neither presented nor considered in Henderson I. Notwithstanding the absence of a direct adjudication of that issue, the district court disposed of the instant claims against the non-medical defendants by finding the Henderson I court

> did determine that the Defendant's [sic] fulfilled their duty to protect the Plaintiff; that this implicitly includes their duty to establish policies may arguable be speculative, however, it is not necessary that the issue in question was actually raised in the previous action as long as it could have been raised.

(J.A. at 526, citing Allen v. McClurry, 449 U.S. 90, 94 (1980).

Under res judicata, or claim preclusion, a final decision on the merits of an action precludes the parties

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after a factual hearing.

or their privies from relitigating issues that actually were raised or could have been raised in that action. Migra v. Warren City School Dist. Bd of Educ.,465 U.S. 75, 77 n.1 (1984). Collateral estoppel, or issue preclusion, bars the relitigation, in different causes of action, of factual or legal issues previously determined by a court as a necessary precursor to the entry of judgment. Id.

Henderson argues that, although Williams was a defendant in Henderson I, the cause of action and relevant issues in this case are different. However, Henderson cannot seriously challenge the full and fair opportunity, represented by Henderson I, to litigate his claims against Williams. The issues presented in this § 1983 action could have been raised previously, and the district court

properly disposed of Henderson's claims against Williams on the basis that those claims were therefore precluded.[5]

Henderson's verbatim claims against Kessler and Murray are also barred by claim preclusion because their interests are "aligned" with Williams in both the previous and current actions, Comite De Apoyo a Los Trabajadores Agricolas v. United States Dep't of Labor, 995 F.2d 510, 514 (4th Cir. 1993), by the statutorily-created supervisory and managerial relationship between the

---

[5] We note that Henderson filed another § 1983 action against other defendants during his brief incarceration at PRCC, alleging inadequate medical care and handicap facilities at that institution. *Henderson v. Mahon*, No. 89-1724-AM (E.D. Va Mar. 4, 1991). No allegations of inadequate policies and procedures were asserted in that complaint. Henderson failed to object to the magistrate judge's recommended finding that the PRCC Defendants had not shown deliberate indifference to Henderson's medical needs. *Henderson v. Mahon*, No. 89-1724-AM(E.D. Va. Oct. 15, 1992).

governing officials of the Virginia Department of Corrections and the wardens of correctional facilities within their jurisdiction. Va. Code Ann. Section 53.1-10(1) (Michie 1991); see United States v. Manning Coal Corp., 977 F.2d 117, 121 (4th Cir. 1992) (privity "is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include the other within the res judicata.") (quoting Bruszewski v. United States, 181 F.2d 419, 423 (3rd Cir. 1950) (Goodrich, J., concurring).

We also note that Henderson's claims against Kessler and Murray lack substantive merit, for there has been no attempt to demonstrate, nor can we discern from the record, that the need for improved medical policies and procedures was "so obvious" or that the

inadequacy of the existing policies and procedures was "so likely to result in the violation of constitutional rights" as to constitute actionable deliberate indifference. Mitchell v. Aluisi, 872 F.2d 577, 581 (4th Cir. 1989) (quoting City of Canton v. Harris, 109 S. Ct. 1197, 1205 (1989).Moreover, Kessler and Murray cannot be held accountable under a theory of supervisory liability for a subordinate's constitutional violation, absent a constitutional violation by that subordinate. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 724 (4th Cir. 1991), cert. denied, 112 S. Ct. 1172 (1992).

Finally, given the properly-entered order of summary judgment for Defendant's Dr. Nguyen, Williams, Kessler and Murray, we find the district court did not abuse its discretion in refusing to revisit

that order, Poynter v. Ratcliff, 874 F.2d 219, 223 (4th Cir. 1989), and affirm the district court's denial of Henderson's Motion for Reconsideration.

III.

This action is an attempt by Henderson to revive a claim that has been already, or could have been, adjudicated. While his accident is unfortunate, Henderson failed to demonstrate deliberate indifference by the parties treating and evaluating him and by the parties in charge of the facilities in which he was housed. Therefore, there is no actionable § 1983 claim and we affirm the district court's entry of summary judgment in favor of Dr. Nguyen, Williams, Kessler, and Murray.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ROGER HENDERSON,)
Plaintiff,)
)
v.) Case No:3:92-CV-346
)
RAY KESSLER, et al.,)
Defendants)

ORDER

For the reasons stated in the accompanying memorandum, and deeming it just and proper so to do, it is hereby Adjudged and Ordered that the Defendants Murray, Williams and Kessler's motion for summary judgment in this matter e and the same is hereby GRANTED. Likewise, Defendant Dr. Nguyen's motion for summary judgment is also GRANTED.

Let the clerk send copies of this Order and the accompanying Memorandum to all counsel of record.

12-8-92
Date

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ROGER HENDERSON,)
Plaintiff,)
)
v.) Case No: 3:92-CV-346
)
RAY KESSLER, et al.,)
Defendants)

MEMORANDUM

This matter is before the Court on two separate defense motions for summary judgment. The parties have briefed the issues and waived oral arguments, therefore, the matter is ripe for decision.

The record reflects the following: At all relevant times, the Plaintiff was a prisoner of the Virginia Department of Corrections. On August 17, 1988, officers of the Richmond City Sheriff's Department were transporting Plaintiff to

the Henrico County Jail. Apparently, the driver was forced to slam on the brakes during the trip, and the Plaintiff hit the inside wall of the prison van with great force. The Plaintiff was taken to St. Mary's Hospital in Richmond, Virginia where he was treated and released.

The Plaintiff was eventually taken to the Henrico County Jail where he was incarcerated for approximately six months before he was transferred to the Powhatan Correctional Center ("PCC"). The Plaintiff alleges, as the foundation for his complaint, that while incarcerated in Henrico, and subsequently in Powhatan, Virginia, he was systematically deprived of adequate medical treatment in violation of his Eighth Amendment rights and deprived of the due process in violation of his Fourteenth Amendment rights. On the basis of the foregoing,

the Plaintiff brings this action under 42 U.S.C. § 1983.

By an Order dated November 10, 1992, this Court Denied Defendants Murray, Williams, and Kessler's motion to dismiss except as it related to liability through respondeat superior. As to respondeat superior liability, the Defendants' motion to dismiss was Granted. This same Order Denied Defendant Dr. Nguyen's motion to dismiss with respect to potential liability under 42 U.S.C. §1983, but Granted Defendant Dr. Nguyen's motion to dismiss the allegations of malpractice. Therefore, there are only two remaining theories of liability: 1.) whether Defendants Kessler, Williams, and Murray are directly responsible, under 42 U.S.C. § 1983, for the alleged violations due to deliberate indifference on the part of each in failing to establish

policies, procedures, or custom designed to protect the Plaintiff's rights; and 2.) whether Defendant Dr. Nguyen is responsible, under 42 U.S.C. § 1983, for his alleged deliberate indifference to the inmate's serious medical need.

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment, and pursuant thereto, summary judgment is appropriate only where parties do not dispute material facts that might affect the outcome of an action. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To defeat summary judgment, a nonmoving party, who will bear the burden of proof at trial on a dispositive issue, must go beyond his or her pleadings with affidavits, depositions, interrogatories or other admissible evidence to show specific facts that amount to a genuine

issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1985). Where the parties show no dispute of material fact, summary judgment is appropriate.

Defendants Murray, Williams, and Kessler's motions for summary judgment requests this Court to find that the issues now before it previously have been litigated by the Plaintiff in Henderson v. Williams, et al., C.A. No. 89-1723-AM (E.D. Va. June 13, 1991). In that case, Judge Cacheris specifically examined whether there were adequate facilities for handicapped prisoners and whether the Defendant's were deliberately indifferent to their duty to protect the Plaintiff. The Court in that case granted the Defendants' motion for summary judgment, except for one specific allegation of a loose handrail in a toilet facility, which the Judge determined required a

factual hearing. This remaining claim was later dismissed by an Order dated July 29, 1991.

Defendants Murray, Williams, and Kessler contend that this Court's decision in the Alexandria division bars prosecution of the instant case by reason of res judicata and collateral estoppel. The principles of res judicata and collateral estoppel apply to § 1983 actions. Migra v. Warren City School District Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980). Under res judicata, a final decision on the merits of an action precludes the parties or their privies from relitigating issues that were raised or could have been raised in that action. Allen, at 94. Under collateral estoppel, once the court has decided an issue in a suit on a different cause of

action involving a party to the first case. Id.

The Defendants claim that the Plaintiff had a full and fair opportunity to litigate these claims in the prior suit, and that even though Defendants Murray and Kessler were not parties to the first suit, a litigant who was not a party in a federal case may use collateral estoppel offensively in a new suit against the party who did not prevail in the first case. Parkline Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328 (1971).

The Plaintiffs argue that Judge Cacheris did not decide the issue of whether the Defendants' were deliberately indifferent to their duty to establish adequate policies, procedures, or custom

designed to protect the Plaintiff's rights. Judge Cacheris did determine that the Defendant's fulfilled their duty to protect the Plaintiff; that this implicitly includes their duty to establish policies may arguably be speculative, however, it is not necessary that the issue in question was actually raised in the previous action as long as it could have been raised. Allen, 449 U.S. at 94.

In light of the decision in Henderson v. Williams, C.A. No. 89-1723-AM, the combined principles of res judicata and collateral estoppel bar the Plaintiff's present claim against Defendants Murray, Williams, and Kessler.

Defendant Dr. Nguyen makes a separate motion for summary judgment. This Defendant's motion is based on two theories. First, the Defendant attempts

to avail himself of the decision in Henderson v. Williams, C.A. No. 89-1723-AM, through collateral estoppel. This effort must fail since the instant Plaintiff alleges specific acts or omissions unique to this Defendant that could not have been raised in the previous action.

Simply stated, the Plaintiff alleges that Dr. Nguyen was deliberately indifferent to the Plaintiff's serious medical needs. Since the Plaintiffs will bear the burden of proof on this issue a trial, the Plaintiff must go beyond the pleadings with affidavits, deposition, interrogatories, or other admissible evidence to show a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1985). The Defendant's motion, supporting affidavit, and deposition of Dr. Nguyen supplies

abundant examples of examinations of the Plaintiff by the Defendant doctor and his effort to see to Plaintiff's medical needs including referral to a specialist at MCV, and subsequent treatment according to the recommendations of that specialist. The Plaintiff has failed to provide one supported allegation of deliberate indifference. The Plaintiff claims that his expert is unavailable for deposition because he has been out of the country since November 21, 1992. This reason for failing to support his allegations is not only irrelevant, but it is unpersuasive since this action has been pending since May 6, 1991, and the Defendant's motion for summary judgment was filed on November 12, 1992. There is no excuse for the Plaintiff waiting until this late date and then complain about the unavailability of an expert.

The Plaintiff also complains that the Defendant's action, filed on November 12, 1992, is untimely given this Court's pre-trial Order specifying that all motions for summary judgment must be filed thirty-five (35) days prior to trial. In this case, that deadline would be November 11, however, November 11, was Veteran's Day and the courthouse was officially closed. Rule 6 of the Federal Rules provides that when an order of a court, a statute or rule prescribes a date for filing a pleading which falls on a legal holiday, the pleading may be filed on the next day. Since the Defendant's motion for summary judgment was timely, and because the Plaintiff has failed to provide one supported allegation of deliberate indifference, Defendant Dr. Nguyen's motion will be Granted.

An appropriate Order will issue.

UNITED STATES DISTRICT COURT

12-8-92
Date

AMENDMENT VIII TO UNITED STATES CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX C

42 U.S.C. §1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of the section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D

AMENDMENT XIV TO UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Untied States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

to page 2 of exhibit one and the handwritten notes contained thereon which bear the signature of, you've advised us, of Bruce Stelmack, your resident, and having reviewed those notes would you please tell the ladies and gentlemen of the jury the opinions you have today about the status of Roger Henderson as of the time that you examined him and the conclusions, impressions and opinions you formed to a reasonable degree of medical certainty?

MS.SINCLAIR:Objection, asked and answered and cumulative. You can answer it.

Q: You may answer, Doctor.

A: I have not seen him since that time, but I'm assuming today he's till paralyzed and in a wheelchair according

to our physical examination.

Q: Perhaps I didn't ask my question clearly. In light of the objection let me try and rephrase it.

Doctor, based upon your review of the medical records and your recollection of your examination of Roger Henderson on the 5th of June 1990, would you please state to the ladies and gentlemen of the jury your opinions to a reasonable degree of medical certainty as to his medical condition?

MS. SINCLAIR: I restate the same objection.

Q. You may answer, Doctor.

A. His medical condition was paraplegia with a neuro --- with a paralyzed bladder, and a patient who was wheelchair bound, unable to ambulate and the paralysis appeared to be permanent at that particular time.

Q. Would you please explain that in lay person's English for the ladies and gentlemen of the jury, please?

A. Basically this patient was going to be in a wheelchair for the rest of his life and not be able to walk again.

Q. And the other medical terms you used in your last answer, would you please explain those, Doctor?

A. And that he would have to have some sort of tube to drain his bladder because his bladder would be also paralyzed for the rest of his life.

Q. Finally, Doctor, would you please explain within a reasonable degree of medical certainty the definitions that you use for the terms paralyzed and paraplegia?

A. The terms paralyzed and paraplegia means that the patient has no

function of the lower extremities, which means the patient is unable to ambulate because they cannot move their legs.

Q. By ambulate, what do you mean, Doctor?

A. Walk, the patients cannot walk because they cannot use their legs.

Q. Is that the condition in which you found Roger Henderson on the 5th day of June 1990 when you examined him?

A. That is correct.

Q. Thank you very much, Doctor.

MS. SINCLAIR: Nothing further.

(Deposition concluded at 4:30 p.m.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ROGER HENDERSON,	
Plaintiff	
v.	CASE NO:3:91CV00346
RAY KESSLER, et al.	
Defendants	

AFFIDAVIT

REX C. SMITH, first being duly sworn, states as follows:

1. I am the President of the American Justice Institute, P.O. Box 482, Burtonsville, MD 20866. (301) 871-1781.

2. I have over thirty-two (32) years of experience working in the Criminal Justice System, including all levels of state and federal correctional institutions, particularly in the development and management of policies

and procedures related to the functional operations of such correctional facilities.

3. At the request of the Plaintiff herein, I have reviewed those policies and procedures in effect for the Virginia Department of Public Safety and the Division of Correctional Services, as promulgated by the Commonwealth of Virginia.

4. Based on the aforementioned review, it is my considered opinion, that:

a. The Defendants in this case had the affirmative duty to develop and promulgate appropriate policies and procedures designed to protect inmates and provide specialized care as prescribed or as necessary given their particular circumstances.

b. The Defendants failed in

meeting their responsibilities to establish and promulgate appropriate policies and procedures intended to protect the Plaintiff and similarly situated inmates, specifically because those policies and procedures in effect are generally outdated and not consistent with current standards. In addition, in those cases where a policy has been promulgated there is no effective implementation or a method of assuring implementation and effective delivery to the inmate.

c. That Defendants failure was a result of their individual and collective deliberate indifference toward the establishment, promulgation and implementation of the appropriate and necessary policies and procedures, and

d. The defendants failure was a proximate cause of the injuries and the

exacerbation thereof suffered by the Plaintiff while in confinement by the Commonwealth of Virginia.

REX C. SMITH

State of Maryland)
County of Montgomery) ss

Subscribed and sworn to before me this 29th day of September, 1992

NOTARY PUBLIC

My commission expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ROGER HENDERSON	:	
Plaintiff	:	
	:	
v.	:	Civil Action
	:	No. 3:91CV00346
RAY KESSLER, et al.,	:	
Defendants	:	
.....	:	

Deposition of the Defendant, TIEN DUC NGUYEN, M.D., called as an adverse party by and on behalf of the Defendants, pursuant to the Federal Rules of Civil Procedure, taken before C.W. Girard, C.M. Registered Professional Reporter and Notary Public within and for the State of Virginia, at Large, at the offices of McGuire, Woods, Battle & Boothe, Conference Room 6A, 1 James Plaza, Richmond, Virginia on Wednesday, the 18th day of November 1992, commencing at 10:35 a.m.

APPENDIX H

BY MS. HALLIGAN:

Q. Thanks.

A. So, on May 4, 1989, Mr. Henderson come to see me. He's complaining of low back pain. Is aggravated by a firm mattress and he's asking me to have an egg crate mattress.

So, saw him, and has some tenderness in low back, some stiffness. Have history of paraplegia. So my impression is low back strain and paraplegia, and he's still on self-medication program.

Excuse me. I recommend self-medication program for him and Motrin two times a day and issue an egg crate mattress.

MR. HERRING: Let me make sure I understand. Maybe I missed -- is it self-medication, S E L F?

BY MS. HALLIGAN:

So your notes don't indicate, then, you referred him to--

A. No. I don't refer on that day.

Q. Is paraplegia a neurological condition?

A. Yes. I think so.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Roger Henderson	:	
Plaintiff	:	
	:	
v.	:	Civil Action
	:	No. 3:91CV00346
Ray Kessler,et al.	:	
Defendant	:	
.....	:	

Deposition of the Plaintiff, ROGER RAMONE HENDERSON, called as an adverse party by and on behalf of the Defendants, pursuant to the Federal Rules of Civil Procedure, taken before C.W. Girard, C.M., Registered Professional Reporter and Notary Public within and for the State of Virginia, at Large, at the offices of McGuire, Woods, Battle & Boothe, Conference Room 6A, 1 James Plaza, Richmond, Virginia on Wednesday, the 18th day of November 1992, commencing at 2:53 p.m.

APPENDIX I

Q. Yes, sir.

A. They used to carry me down for what they call therapy.

Q. Physical therapy they called it?

A. Physical therapy and what it consisted of, which I thought was ironic. They used a TENS unit, placed one pad on one shoulder and the back; one pad on one shoulder on the right and one pad on the shoulder and on the left and they placed -- I mean, one what they call an electrode that goes to a TENS unit on each side of my shoulder and on each side at my lower back.

That was the extent of the therapy I received the entire time I was at Powhatan Correctional Center.

Q. That was physical therapy that was prescribed by MCV?

A. That's what they called it. I don't know who it was prescribed by. That's why I went to get what was supposed to get physical therapy. I know that MCV can't do anything more than the Department of Correction will approve.

Q. Were you seen by an institutional urologist

FEDERAL RULES OF CIVIL PROCEDURE

RULE 56(c)

Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.